ERICKSON, THORPE & SWAINSTON, LTD.

NEVADA LAW BULLETIN

EEOC Turning Up The Heat On Retaliation Claims

Rebecca Bruch, Esq.

Trends reveal that employment retaliation claims are sharply on the rise. Record numbers of EEOC complaints are being filed. Nearly 43 percent of all private-sector charges filed in 2014 included retaliation claims, roughly twice as many as in 1998. And 1998 was the last time the EEOC issued guidance on retaliation.

On January 21, 2016, the EEOC issued proposed guidance which has been released for public comment, which is due February 24. The most significant change in the proposed guidance is the broadened definition and scope of how "participation" is defined. In the past, courts have held that participation for purposes of retaliation applied only to EEO activity in conjunction with a formal EEOC charge. That has changed. Retaliation requires:

- Employee engagement in protected activity – either participation in EEO activity or the individual's opposition to discrimination.
- Adverse action taken by the employer.
- A casual connection between the protected activity and the adverse action.

The employee does not have to oppose employer conduct to be engaged in protected activity. Employees who voluntarily participate in employer investigations into EEO allegations, or even provide neutral or pro-employer information about an alleged violation, or employees who request accommodation of disability or religious practices, can be engaged in protected activity. In J*ohnson v. North American Stainless*, the plaintiff had not even complained of workplace illegality in any form. His fiancé had done so. Three weeks after she complained, the plaintiff was fired.

Lower courts ruled that Title VII did not cover retaliation against someone who merely associated with someone who complained. Surprisingly, the conservative U.S. Supreme Court ruled that Title VII does protect employees who associate with someone who complains of illegal discrimination.

The proposed guidance states that the EEOC views participation as

Continued on page 2

EEOC Turning Up The Heat On Retaliation Claims

Continued from page 1

including internal EEO complaints to company management, human resources or otherwise made within an employer's internal complaint process before a discrimination charge is actually filed with the EEOC or a state or local agency. Participation might also include being a witness.

Today's employees are sophisticated and generally well-versed with at least a basic understanding of harassment and discrimination protections. They believe that they are protected simply by virtue of having raised any kind of employment-related concerns. Translation: employees believe they have a get-out-of-jail-free card. Employers can still proceed with discipline for employees who have raised an EEO allegation. Those employees are not immune from performance management. But employers must be very careful if they discharge someone who has made a discrimination complaint and have no documented performance problems. Is discipline being meted out for the first time only after a complaint has been made? Even if a complaint is baseless, an employee may still have a viable retaliation claim unless the complaint was made in bad faith or for some other illegitimate reason.

The new definition of "opposition" has been defined expansively. Opposition protects all employees, including those in HR and management. The guidance has given various examples, to include advising an employer on EEO compliance, such as HR reporting EEO violations to management; complaining about alleged discrimination against one's self or threatening to complain; providing information as part of an employer's investigation; refusing to obey an order reasonably believed to be discriminatory. Retaliation for discussing wage-and-hour issues may trigger EEO protection, as well as violating the National Labor Relations Act With the increased EEOC vigilance related to retaliation, and the new guidance that is right around the corner, it is more important than ever that employers be prepared to consistently enforce rules and policies, and for discipline to be well-documented. Employers are encouraged to visit the EEOC website and review the 72 pages of proposed guidance so as to become familiar with the new heightened standards which will be implemented by the EEOC.

OBESITY: Protection under the Americans with Disability Act?

Brittany Cooper, Esq.

It is no secret that the United States population has a weight problem. The American Medical Association has labeled it a "disease." According to a November 2015 survey by the Center for Disease Control and Prevention, between 2011 and 2014, the prevalence of obesity was just over 36 percent in adults and 17 percent in youth. Obesity, however, is more than just a health issue. It is a work place issue and employer's costs associated with obesity are increasing.

The tension that exists when obesity enters a work place is solidified in an ongoing Nebraska case, *Morriss III v. BNSF Railway Company,* which suggests that obesity is an area where employers are advised to tread lightly. In *BNSF*, a former job applicant for a position as a machinist, claims his potential employer failed to honor a job offer because of his weight (arguing it is a "disability" under ADA). Applicant was five foot ten and weighed 282 pounds.

Continued on page 3

OBESITY: Protection under the Americans with Disability Act?

Continued from page 2

He passed all required tests and received a conditional job offer. The offer hinged on him passing a physical exam. He agreed to the exam which revealed that he was "morbidly obese." As a result, a company medical review officer determined, citing company policy, that Mr. Morriss was not qualified for the "safety sensitive" machinist position due to significant health and safety risks associated with his obesity. The company then rescinded his conditional offer.

The question now at issue in the case is whether Applicant's morbid obesity is simply a physical characteristic posing health and safety risks, as claimed by the company, or a physiological disorder and a "disability" covered under ADA. Complicating the issue, and cited by the lower court's finding that Mr. Morriss is not disabled, Mr. Morriss claims that he has no impairments that limit his ability to perform the job and does not need an accommodation or have any medical reports supporting a "disability" due to his obesity.

Depending on how the Eighth Circuit rules in this case, those 36 percent of working-age obese adults may be classified as having an "impairment" under the ADA and become entitled to reasonable accommodations and other workplace protections. While this is certainly not the first time this issue has been raised or litigated, this recent case shows that it is still an unresolved topic and one to which employers should be sensitive. When faced with considerations, employers should remember to consider the possibility that obesity may be a disability under the law and carefully document how they make employment decision about overweight employees.

Legal Advice From A Backseat Driver? The Nevada Supreme Court Weighs In

Anne Alexander, Ph.D., Esq.

> "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."
>
> *City of Houston, Texas v. Hill,* 482 U.S. 451, 465 (1987).

A Carson City sheriff's deputy pulled over a vehicle for running a stop sign at 4:15 a.m. The deputy smelled alcohol coming from the vehicle and began a DUI investigation. While the deputy questioned the driver, petitioner William Scott, who was a passenger in the vehicle, verbally interrupted the deputy three times by telling the driver that he did not have to cooperate with the deputy's investigation. After the third interruption, the deputy arrested Scott under Carson City Municipal Code (CCMC) 8.04.050(1), which makes it "unlawful for any person to hinder, obstruct, resist, delay, molest or threaten to hinder, obstruct, resist, delay or molest any . . . member of the sheriff's office . . . in the discharge of his official duties." After a trial in justice court, Scott was convicted of violating CCMC 8.04.050(1). Scott appealed his conviction to the district court and argued that CCMC 8.04.050(1) is unconstitutionally overbroad and vague. The district court affirmed Scott's conviction.

Scott appealed to the Nevada Supreme Court, arguing that CCMC 8.04.050(1) criminalizes speech that is protected by the First Amendment of the United States Constitution. The Nevada Supreme Court

Continued on page 4

Legal Advice From A Backseat Driver? The Nevada Supreme Court Weighs In

Continued from page 3

agreed, finding that the ordinance criminalized any conduct, including all speech that interrupts a police officer, regardless of intent. The Court explained, "[u]nder CCMC 8.04.050(1), inadvertent, constitutionally protected speech or conduct is sufficient to trigger liability should it hinder or obstruct a police officer in any way. For example, if a sheriff's deputy is conducting an investigation in a public area and a passerby inadvertently obstructs the deputy's view of a suspect, the passerby could be arrested for hindering or delaying the deputy's investigation—despite lacking the intent to do so." In this instance, Scott merely stated that "he knows all about the law" and told the driver that he was not required to cooperate with the deputy. The Nevada Supreme Court reasoned that these statements cannot be construed as "fighting words" or "words that by their very utterance inflict injury or tend to incite an immediate breach of the peace," such that they should not be entitled to First Amendment protection.

The Nevada Supreme Court also found that this section of the CCMC is worded so broadly that "sheriff's deputies are allowed to enforce the law in an arbitrary and discriminatory fashion." Further, it gives sheriff's deputies "unfettered discretion to arrest individuals for words or conduct that annoy or offend them." As an example, the Court pointed out that "if a sheriff's deputy is directing traffic at an intersection, and a pedestrian politely asks the deputy for directions, the pedestrian could be arrested for hindering or delaying the deputy's ability to direct traffic." Thus, this section of the CCMC gives the sheriff too much discretion in its enforcement.

For all these reasons, the Court concluded that CCMC 8.04.050(1) is unconstitutional. The Dissent noted that this decision almost certainly makes analogous laws around the state unconstitutional as well.

EEOC Respondent Position Statements No Longer Confidential

Rebecca Bruch, Esq.

The EEOC has just announced that effective January 1, 2016, their procedures for the release of Respondent (employer) position statements and non-confidential attachments have changed. Upon request from a charging party, the EEOC will provide that information to the Charging Party or his or her counsel. These procedures apply to all EEOC requests for position statements made to Respondents on or after January 1, 2016. The Charging Party will then be given 20 days to provide a written response to the Respondent's position statement. That response will **not** be available to the Respondent.

Previously, the Respondent's Position Statement was confidential, and could not be provided to the Charging Party. The EEOC says, "The procedures will also provide EEOC with better information from the parties to strengthen our investigations." We believe the effect may be just the opposite. Employers may be hesitant to share candid information with an investigator that they are not ready to be shared with a Charging Party, thus making it more difficult to resolve disputes at an early stage in an investigation.

The take-away is that if you are preparing your position statements in-house without the oversight of your counsel, you need to be aware that what you put in those position statements will now be shared with the employee, and is no longer confidential. It is important to consult with an attorney to make sure you do not jeopardize your bargaining position by disclosing information to the EEOC that you do not want the Charging Party to have.

SAVE THE DATE

ETS EMPLOYMENT LAW SEMINAR

March 3, 2016,
8:30 a.m. – 4:00 p.m.

THE GROVE
IN SOUTH RENO

The ETS Employment Law Seminar will be held on March 3, 2016. Contact Gale Sanders at **gsanders@etsreno.com** or **775-786-3930**. We will discuss recent legislative updates, recent court rulings, and current hot topic issues in employment law. We will also discuss the "Dos and Don'ts of Documentation" to help create solid documentation that can be used in future litigation, claims, investigations, and other employment matters. We will conclude the seminar by conducting a mock sexual harassment investigation that will be an interactive session in which attendees and presenters will go through the process of gathering initial information in order to prepare for interviews, assess facts, and discuss the importance of reporting investigation results. Of course, the seminar will also include a delicious lunch catered by The Grove. It's not too late to join. If you wish to register for the seminar, please contact Jennifer Jacobsen at jjacobsen@etsreno.com or call her at 775-786-3930. We look forward to seeing you all there.

ERICKSON, THORPE & SWAINSTON, LTD.

Erickson, Thorpe & Swainston was founded in 1969. Since that time, the Firm has efficiently and successfully represented its clients in state and federal courts in Nevada and Northern California. As experienced trial and appellate attorneys, we vigorously advocate our clients' interests while remaining committed to the principles of the highest legal ethics.

Erickson, Thorpe & Swainston offers committed support in all phases of commercial and civil litigation, including labor and employment law and associated preventative employment services. We provide the experience necessary to meet our clients' expectations for an effective, efficient and timely resolution of their conflicts and issues. Our continued success in this highly competitive market demonstrates our widely recognized ability to deliver satisfaction and positive outcome to those who give us their trust – our clients.